

The Appellate Court View of the Juvenile Court

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Citation Information

Parker, Graham. "The Appellate Court View of the Juvenile Court." *Osgoode Hall Law Journal* 7.2 (1970) : 155-175.
<https://digitalcommons.osgoode.yorku.ca/ohlj/vol7/iss2/2>

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Abstract

The juvenile court has had several distinct phases in its seventy years of existence. The court was founded on a curious Victorian mixture of sentiment ("child-saving"), seemingly sound political economy ("if we save the little rascals from their environment, it will be the end of vice, spiritous liquors, crime and degradation") and hard-headed reform.¹ Although it is not always obvious in the reform literature, which is rather tear-stained, the last named factor is the most important. The radical reformers of the nineteenth century had been working in what might be called the juvenile court movement for many years before the court was itself established. Hard-headed reform resulted in a century of saving children from the thief's gallows, the agonies of chimney-sweeping, or working in coal mines and factories, and the temptations of the gin palaces and other dens of vice.

THE APPELLATE COURT VIEW OF THE JUVENILE COURT

GRAHAM PARKER*

The juvenile court has had several distinct phases in its seventy years of existence. The court was founded on a curious Victorian mixture of sentiment ("child-saving"), seemingly sound political economy ("if we save the little rascals from their environment, it will be the end of vice, spiritous liquors, crime and degradation") and hard-headed reform.¹ Although it is not always obvious in the reform literature, which is rather tear-stained, the last named factor is the most important. The radical reformers of the nineteenth century had been working in what might be called the juvenile court movement for many years before the court was itself established. Hard-headed reform resulted in a century of saving children from the thief's gallows, the agonies of chimney-sweeping, or working in coal mines and factories, and the temptations of the gin palaces and other dens of vice.

The opening of a new form of court was a convenient, and even dramatic, expression of an idea — if children could be protected from these evils listed above and could be raised in segregated orphan asylums, juvenile reformatories and truant schools, then the final gesture for the child-savers was the establishment of a separate tribunal. This new agency was not really a court, although it seemed to be a credible facsimile and it certainly was separate from the detention cells of hardened criminals and was a place of loving understanding rather than one of brutal retribution. The juvenile court, whatever its eventual shortcomings, was an important experiment; it served as a laboratory for the emerging welfare state, and a place where the rehabilitative ideal was practised. As we all know, the use of probation, suspended sentences and humane penology spread, in time, to the adult jurisdiction.

The ambivalent quality of this tribunal in being a partly legal and a partly social agency soon caused the court to enter another phase in its history.

In the first decade of the court's existence, there were a few legal battles fought with irate parents who did not want their children committed to training schools. These constitutional attacks on the court were unsuccessful; the appeal courts decided that the paternalistic approach of the specialized court for children was altogether good and no rights, parental or juvenile, were being infringed. (One fascinating question arising from the drafting of the Illinois

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¹For some of the history of American reform for children, see Parker, *American Child-Saving: The Climate of Reform as Reflected in the National Conference of Charities and Corrections, 1875-1900* (1968), 18 U OF TORONTO L.J. 371.

statute was the preoccupation of the reformers with precautions against legal attacks. At first sight, these safeguards seemed to have been partly inspired by fear of the corrupt politics of Chicago at the turn of the century, but this can hardly be the full answer.²)

After it survived these attacks, the court had a relatively unhampered existence for many years. As the court gained confidence, its auxiliary services and extra-legal embellishments took on greater importance; unfortunately these facets of the court work have been unsuccessful, at least in terms of the expectations of the founders. Probation services were considered to be the backbone of the court, but the practitioners of the new profession of social work were not able to produce the extraordinary rehabilitative results expected of them.

The court's initial twenty years coincided with the first enthusiasm for psychiatry. The court was disappointed by this means of preventing delinquency or saving children. The expectations on both sides were far too high. Delinquency continued to exist and, in fact, increased.³ Psychiatric clinics attached to the courts were not established, or maintained, systematically or with continuity; and the psychiatrists moved on to lucrative private practice, the greener fields of education or the attempted application of other theories which were irrelevant to teen-age juvenile delinquents or "middle-aged" dependent and incorrigible children.

Similarly, the courts attracted the attention of the sociologists and the practitioners of that hybrid (or perhaps bogus) discipline of criminology. For a time, juvenile delinquency was a popular form of research but interest was spasmodic or results were disappointing. The sociologists⁴ left the field open to social workers (and some clinical psychologists) who were free to practise their newly-learned skills of casework and prognosis — but to little avail. The statistics on delinquency showed no diminution despite probation supervision, social histories to assist the judges and training schools to reform the recalcitrant.

Immediately before and after the Second World War, there was widespread disaffection with the juvenile court and the problem of juvenile delinquency. Surveys, reassessments, royal commissions, departmental inquiries and Governors' Committees investigated the juvenile court and juvenile delinquency.⁵ The "left-wing" courts of the United States became

² Compare the history of the juvenile court movement in South Australia which had separate court in the nineteenth century, see Parker, *Some Historical Observations on the Juvenile Court*, 9 CRIM. L.Q. 467.

³ Of course, we must remember that to some extent the juvenile court movement "invented" delinquency or certainly made it much more visible. See Platt, *THE CHILD-SAVERS: THE INVENTION OF DELINQUENCY*, 1968.

⁴ As the discipline of sociology developed, its practitioners departed from their social work brethren's preoccupation with preventive programs, and started theorizing on the actiology of delinquency.

⁵ e.g. see Report of the Committee on Children and Young Persons (1960), Cmnd. 1191 and Report of the Governor's Special Study Commission on Juvenile Justice (1960). For comments on these two reports, see Geis: *Juvenile Justice: Great Britain and California*, 7 CRIME AND DELINQUENCY 111 (1961). See also Juvenile Delinquency in Canada. The Report of the Department of Justice Committee on Juvenile Delinquency (1965).

more conscious of legalistic (or, perhaps one should say, fair) procedures and the glorified magistrates' courts of Great Britain were urged to be more sociological, better staffed with social workers and the trappings of behavioral science. All to little avail — attendance centres, short, sharp shocks, new training schools, and more intensive probationary care seemed to have little effect.

In the United States, the Supreme Court decisions in *Kent*⁶ and *Gault*⁷ have caused a new wave of stock taking and reassessment. The highest court in the United States tried to legislate procedural morality for that country's juvenile courts, and those decisions seemed to fly in the face of the President's Commission on Crime whose recommendations sounded very similar to the complaints of the Victorian reformers who wanted social reform and envisaged it as coming through improved conditions for children. The President's Commission spoke of:

Efforts, both private and public, should be intensified to:—

- Reduce unemployment and devise methods of providing minimum family income.
- Re-examine and revise welfare regulations so that they contribute to keeping the family together.
- Improve housing and recreation facilities.
- Insure availability of family planning assistance.
- Provide help in problems of domestic management and child care.
- Make counselling and therapy easily obtainable.
- Develop activities that involve the whole family together.⁸

Procedural safeguards for juveniles would hardly achieve these results.

The initial aim of this essay was to examine the Canadian juvenile court through the eyes of the appellate courts in this country. There was no expectation that the Canadian courts had made major policy statements or in-depth studies of the court as are found in the judgement of Justice Fortas in *Kent*. Nevertheless, an examination of the Canadian cases has been disappointing. In summary, our courts have little conception or only slight regard for the concept of the juvenile court and the potential importance of its work.

The juvenile court appeals fall into three rough categories. There are numerous reported decisions concerning persons convicted of contributing to the delinquency of a minor. The appeals have usually been decided on narrow procedural issues and are of no great moment in the present context.

Two issues surrounding the contributing cases do, however, concern us. First, what is "contributing"? Some of the more unfortunate definitions have been provided by the superior courts rather than the juvenile courts themselves. The act of contributing can range from some stranger perpetrating a savage sexual assault on a very young child, to cases where the parent has been discovered swearing or drinking in the actual or constructive presence

⁶ *Kent v United States*, (1966) 383 U.S. 541

⁷ *Re the Application of Gault* (1967) 384 U.S. 997

⁸ PRESIDENT'S COMMISSION ON CRIME AND LAW ENFORCEMENT: TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME, Washington 1967, at 47.

of the child. The act of contributing is not taken as one which actually causes or adds to a child's delinquency but simply has a tendency to do so. The height of absurdity is reached in such cases as *Stundon*⁹; at best, the case is absurd in its legal reasoning unless we take the view that men should be sent to jail on the basis of a legal abstraction. In fact, the abstraction is not altogether the law's fault; the views of the judge in *Stundon* are based on crude psychological and sociological concepts. While we quite properly protect children's rights by segregating them from the rigours of adult criminal courts and jails, should we go so far as to invade the rights of adults in the name of protecting children who may not, in fact, be in danger of becoming delinquent or of being degraded by the acts of the adult?

There is also constant discussion of the advisability of having contributing cases tried in juvenile courts. There have been few instances in which the contributing adult's rights have been abused in the juvenile court. Indeed, most of them have been given more lenient treatment¹⁰ in that court than they would have received in ordinary criminal courts.

The second class of case is one where some procedural irregularity has resulted in a juvenile's appealing to a higher court. Many of these are based on notice to parents or the official position of the magistrate concerned. None of these cases makes a deep analysis of the constitutional issues (if there are any), and there is little discussion of the procedure which should be followed in a specialized court for children.

Finally, there are the waiver cases in which the juvenile court judge has decided that a charge against a child should be transferred to an adult court.

In February 1960 the English newspaper, *The Guardian*, published a leading article expressing shock at the proposed hanging of a fourteen-year-old boy convicted in adult court of a rape-murder. Ironically, the convicted youth, Steven Truscott, was just a few months over the age at which the law recognized, by irrebuttable presumption, that he was incapable of committing rape. He was an identical space of seven months over the age when his case could not, by law¹¹, be removed from the juvenile to the adult court.

A book on the Truscott case¹² received wide attention. The author was very critical of the Canadian legal system and particularly of a criminal law which would allow the trial of a fourteen year old boy to be removed from juvenile court to the adult jurisdiction.

Acting under Section 9 of the *Juvenile Delinquents Act*, the juvenile court judge had decided that "the good of the child and the interest of the community demand" that Truscott be remanded for preliminary hearing before the local magistrate (who, in the rural community concerned, also happened to be the juvenile court judge).

⁹ *Stundon*, (1962) 40 W.W.R. 565; see comment in Parker, *Mens Rea and Contributing to Juvenile Delinquency*, 28 SASK. B. REV. 78 *et seq.*

¹⁰ *e.g. Rex v S.*, (1946) 87 C.C.C. 154

¹¹ *Juvenile Delinquents Act*, R.S.C., Section 9 (1)

¹² Le Bourdais, *THE TRIAL OF STEVEN TRUSCOTT*, Toronto, 1966.

In the High Court of Ontario, the appeal judge agreed with the magistrate that:

. . . notwithstanding the publicity and strain of a trial it is my opinion that it would be for the good of the child to have his position in respect to such a serious charge established by a jury which would remove any possible criticism of having such a serious matter determined by a single judge in camera proceedings.

I think it is also in the interests of the community that the public be assured that in a matter of this kind where public sentiment may have been aroused, the trial and disposition of the matter shall be in the ordinary course and free from any criticism.¹³

Mrs. Le Bourdais, who is a layman, was mystified by these legal decisions because she believed that:

The basic principle of (juvenile court) legislation is that the good of the child is best served by public anonymity, by treatment of the child as an individual and by avoidance of public prosecution, conviction, and the stigma of a criminal record. In theory, at least, the Juvenile Court aims to counsel, to reform, and to help a delinquent child become a responsible adult.¹⁴

A further hearing of the *Truscott* case was held by the Supreme Court of Canada after the reprieved murderer had spent six years in juvenile reformatory and adult penitentiary. The Supreme Court did not disturb the original verdict.

In *Kent v. United States*,¹⁵ the United States Supreme Court examined for the first time, the legal structure of the juvenile court. After sixty-seven years, the highest court in the United States had consented to hear a case in which the appellant had alleged wrongful treatment at the hands of a juvenile court.

Unlike Truscott, this was not Kent's first encounter with the juvenile court. He was the son of a woman who was deserted by her husband when the boy was two years old. At fourteen years of age, Kent had been apprehended for a series of housebreakings and an attempted purse snatching. He was placed on probation after the Social Service Department of the juvenile court had made an investigation. Two years later, while still on probation, police discovered Kent's fingerprints in the apartment of a woman who had been raped by an intruder who also stole her wallet. Kent was taken into custody and interrogated by police for seven hours. He admitted his involvement in the rape and volunteered information as to other offences of housebreaking, robbery and rape.

After the interrogation, Kent was taken to the Receiving Home for Children; in no other way did the police appear to adhere to the usual procedures for the handling of juveniles in custody.¹⁶ On the following

¹³ 31 C.R. 76 Cf. for instance, a case cited by Mrs. Le Bourdais, *op. cit.* at 34, in which a jury acquitted a fourteen year old of murder. The trial judge McRuer J. said: "It is inappropriate that young persons under the age of 16 should be tried in ordinary courts. A tribunal dealing with each individual case should know the alleged delinquents' innermost story, a practice which cannot be pursued in an ordinary court."

¹⁴ *Op. cit.*, at 34

¹⁵ 86 S. Ct. 1045 (1966)

¹⁶ Para 1 on page 1048.

morning, the youth's mother retained counsel who conferred with the Social Service Director of the Juvenile Court and informed that official of his intention to oppose waiver of the case to the adult court.

Kent was detained at the Receiving Home for a week. During that time, no arraignment was held and no determination was made by any judicial officer of "probable cause" for the detention as would be a necessary protection of an adult's rights. His lawyer had him examined by two psychiatrists and a psychologist. Their report, which described Kent as "victim of severe psychopathology" and recommended further observation in a psychiatric hospital, was filed with the juvenile court. Kent's counsel submitted that the Juvenile Court should retain jurisdiction over Kent, suggesting that if the juvenile was given "adequate treatment in a hospital under the aegis of the Juvenile Court, he would be a suitable subject for rehabilitation."¹⁷

Kent's counsel applied to the juvenile court for access to its Social Service file on his client. He maintained that he needed information from the file so that he could provide effective representation.

The Juvenile Court judge did not rule on any of these applications. He held no hearing and did not confer with the boy, his parents or counsel. The judge ordered that, after "full investigation"¹⁸ jurisdiction would be waived to the adult court. In handing down this order, he made no findings and gave no reasons.

Appeals from this order were unsuccessful. The District Court ruled that it would not "go behind" the judge's order following a "full investigation".

Kent was subsequently found competent to stand trial¹⁹ and was tried on eight charges of housebreaking, robbery and rape. On the two charges of rape, the jury acquitted Kent by reason of insanity but on the remaining six counts, he was found guilty.²⁰ This strange verdict meant that Kent would be sent to a mental institution until his sanity was restored and then he would start serving the total of thirty to ninety years imposed for the six convictions for housebreaking and robbery.²¹

¹⁷ *Id.* at 1049.

¹⁸ S.11-914 of the Juvenile Court Act (D.C. Code) provides that:—

"If a child sixteen years of age or older is charged with an offence which would amount to a felony in the case of an adult, or any child charged with an offence which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offence if committed by an adult: or such other court may exercise the powers conferred upon the juvenile court in this subchapter in conducting and disposing of such cases."

¹⁹ See n.8 at 1051 for the psychiatric findings.

²⁰ An explanation of this is given by Justice Fortas in n.10 at 1051-1052: . . .

some support in the record, that the jury might find that the robberies had anteceded the rapes, and in that event, it might conclude that the housebreaking and robberies were not the products of his mental disease or defect, while the rapes were produced thereby.

²¹ He was given five to fifteen years on each count to be served consecutively. His appeal to the United States Court of Appeals for the District of Columbia failed: 343 F. 2d 247 (1964)

Before the Supreme Court of the United States, Kent argued that his detention and interrogation were unlawful, that the police failed to follow the procedure prescribed by the Juvenile Court Act, that he was deprived of his liberty for a week without a determination of probable cause, that he was interrogated by police in the absence of counsel or a parent (and without the usual caution), that he was fingerprinted which was a violation of the Juvenile Court legislation.

In all these submissions, Kent was claiming, in effect, that he was not treated as an adult would have been dealt with by the police and the criminal courts. This does not necessarily mean, of course, that he wanted to be dealt with as an adult but rather as a juvenile with the same basic safeguards.

At this point, it might be best to be reminded of the provisions found in most juvenile court legislation as a philosophy of the court. The original Illinois Act provided that:—

This act shall be liberally construed to the end that its purpose may be carried out, to wit, the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents. . .²²

The Policy Memorandum of the D. C. Juvenile Court has added a gloss to these bald, and rather nebulous, policy statements. This Memorandum sets out the considerations which a juvenile court judge must take into account in deciding upon waiver. In other words, it lays down the guidelines for a "full investigation". It states that:

The statute sets forth no specific standards for the exercise of their important discretionary act, but leaves the formulation of such criteria to the judge.

The criteria laid down include:—

- (1) the seriousness of the alleged offense to the community and whether protection of the community requires waiver;
- (2) whether the offence was committed in an aggressive, violent, pre-meditated or wilful manner.
- (3) Greater weight will be given to offences against persons, particularly if personal injury resulted.
- (4) "Prosecutive merit". This is qualified as "whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney)".⁽¹⁷⁾
- (5) The sophistication and maturity of the juvenile as determined by consideration of his home environmental situation, emotional attitude and pattern of living.

²² Laws of Illinois 1899, p. 131.

Section 38 of the Canadian Juvenile Delinquents Act, R.S.C 1952 c.160 provides that:—

"This Act shall be liberally construed to the end that its purpose may be carried out, namely that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents and that as far as practicable every juvenile delinquent shall be treated, not as criminal but as a misdirected and misguided child, and one needing encouragement, help and assistance."

²³ Policy Memorandum No. 7, November 30, 1959. This has now been rescinded.

- (6) The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.
- (7) The prospectus for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile by the use of procedures, services and facilities currently available to the Juvenile Court.

Justice Fortas' judgment is interesting because it reflects the ambivalence which the critics and supporters of the juvenile court have felt over the past sixty years. On the one hand, juveniles' rights should be protected by the Supreme Court is not prepared to go so far as to say that it should be with the strictness which has been applied to the "due process of law" guarantees under the United States Constitution. While the juvenile court is not exactly a criminal court, it is not a civil court either. While the juvenile court judge should be given a wide discretion, he must act with some semblance of legalism so that the rights of juveniles are not abused.

Justice Fortas treated the arguments on behalf of Kent as peculiar to the case before him. He was interested in the way in which Kent's rights had been protected, or lacked protection, in this particular instance, although, he stated the need to discuss "basic issues". The judgment of the Supreme Court never really amounted to that. Fortas, J. said that the need to discuss the basic issue of the protection of the juvenile commensurate with safeguards for adults was particularly relevant where, as in Kent's case, "there is an absence of any indication that the denial of rights available to adults was offset, mitigated or explained by the action of the Government as *parens patriae*, evidencing the special solicitude for juveniles commanded by the Juvenile Court Act".²⁴

At the outset, it should be made clear that the Supreme Court did not wish to discuss the merits of the waiver itself. The court also declined the invitation to rule applicable those "constitutional guarantees which would be applicable to adults charged with . . . offences" similar to those committed by Kent. What, then, is left? The court held that the petitioner was entitled to a hearing, including access by his counsel to the social record, probation and other reports upon which the juvenile court presumably relied. Fortas J. based this finding on the statutory requirements "read in the context of constitutional principles relating to due process and the assistance of counsel".²⁵ How can these two statements i.e., evasion of the constitutional issue and a reliance upon due process be reconciled? Perhaps the answer is that this case takes us no further in our examination of the juvenile court and any possible resolution of the problems surrounding it.

²⁴ 86 S. Ct. 1045, at 1059-1960.

²⁵ *Id* at 1052.

Obviously, the Court, per Fortas J., had serious doubts about the operation of the Juvenile Court, in the District of Columbia or at least, in the case of Kent. The opinion written by Fortas J. recognised that most juvenile courts are "rooted in social welfare philosophy rather than in the *corpus juris*".²⁶ The justice went on to describe the role of the juvenile court:

The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae* rather than prosecuting attorney and judge.²⁷

He further observed that the "parental" function of the juvenile court did not infer an "invitation to procedural arbitrariness".²⁸

Although the hearing may be informal, there must be a hearing at which the child is entitled to representation by counsel who is allowed to see the child's social records. "These rights," stated Fortas J., "are meaningless — an illusion, a mockery — unless counsel is given an opportunity to function."²⁹ He continued: "The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice."³⁰ The Supreme Court recognised that proceedings of the juvenile court are designated as civil rather than criminal. The juvenile court is given considerable latitude but this is not a complete freedom. "It assumes", said Fortas J., "procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness as well as compliance with the statutory requirement of a 'full investigation'."

What then is due process in this context? Does it mean as it would seem to mean, that the judge must act "judicially". He can act in this manner in a "civil" capacity. This capacity would simply entail a proper regard for the basic tenets of judicial behaviour and court procedure — the proper reception of evidence (according to well established rules of law) in open court hearings by a judge with tenure who gives reasons for judgment and allows each party to have equal access to all material which may affect his decision. The criteria of reasons and Kent's counsel's access to court records seems clear enough. But are they? The administration directives of the D.C. Juvenile Court do not set out clearly defined procedures which could be described as embracing due process. At least on a waiver application, no juvenile could complain that all the relevant factors were not taken into account. The directive (cited above) makes intelligent guesses hopefully corroborated by the findings and opinions of social and behavioural scientists so that the best disposition will be provided for the juvenile. The memorandum recommends that the treatment and diagnostic personnel must "develop fully all available information which may bear upon the criteria and factors"³¹ outlined in the

²⁶ *Id* at 1054.

²⁷ *Id* at 1055.

²⁸ *Id*.

²⁹ *Id* at 1054.

³⁰ *Id*.

³¹ *Id* at 1060.

Memorandum. Furthermore, the directive also suggests (it could not be put any stronger) that "(a) knowledge of the judge's criteria is important to the child, his parents, his attorney, to the judges (of adult court), to the United States attorney . . . and to the . . . police . . ., as well as to the staff of this court, especially the Juvenile Intake Section".³² This last provision would suggest that the Supreme Court is simply reinforcing a principal of some flexibility and uncertainty of which the juvenile court judge is already apprised.

In the opinion of Fortas J., "there may be grounds for concern that the child receives the worst of both worlds; that he gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children".³³

The learned justice prefaced these remarks by exposing the sad fact that some juvenile courts "lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity".³⁴ This, unfortunately, is a true assessment of the present state of treatment resources.

Therefore, what remains is the position we faced before except for the fact that U.S. Supreme Court has discussed the problem. The Court was faced with the dilemma which has plagued the juvenile court for the past forty years. What is due process if it is not due process? What is rehabilitation, "understanding" treatment of a teen-age criminal, and the current theory on juvenile delinquency and its actiology? No court can answer these but perhaps the court was a little foolhardy in hoping to solve this problem by laying down rules in an area where rules are impossible.

In Canada, the Steven Truscott case provided the most important illustration of a waiver case. In trying to look at that case in perspective, what effect did that case (and the events which occurred ten years after Truscott's conviction) have on the reputation or "public image" of the juvenile court? The obvious answer is that the public (or the courts for that matter) gave little thought to the proper role of the juvenile court. Steven Truscott was one of the youngest ever transferred to the adult court. The fact that the case caused so much belated outcry was partly connected with that fact. Isabel Le Bourdais has explained that she was incensed and horrified by the sentencing to death of a fourteen year old. The case also accentuated some of the problems faced by the juvenile court — part-time juvenile court judges, the difficulties which arise when the juvenile court judge is also the magistrate who hears the preliminary hearing which he transfers to himself,³⁵ the difficulties where a crime is committed in a community of low population and public outrage is running high. The Truscott case is a sad reminder of the fact that the juvenile court has made very little impact on public opinion, that

³² *Id* at 1059.

³³ *Id* at 1057.

³⁴ *Id* at 1054.

³⁵ This should no longer happen under the Provincial Courts Act, which provides for judicial specialization.

the philosophy of the juvenile court is not well understood and is probably not respected. Of course, from a penal point of view the decision to treat a fourteen-year old as an adult criminal is shocking. Most reviews of Le Bourdais' book from outside Canada were by reviewers who were relatively unaffected by the sensation caused in this country but were nevertheless surprised to find this treatment of Truscott at a time when the humane disposition of children's cases was more than one hundred years old.

The following is a survey of reported waiver cases, i.e. cases in which an allegation of juvenile delinquency was to be transferred to the adult court to be tried as a crime. There are only 21 of them. Two provinces are disproportionately represented. British Columbia has eight and Manitoba seven. Two were from Saskatchewan, three from Ontario and one from Alberta. (As far as is known, the Toronto Juvenile Court has never waived a case, appealed or otherwise).

The charges were almost all for "serious" crimes if committed by adults. Ten were charges of murder, three manslaughter, one rape, and 2 lesser offences involving violence to the person. There was one arson, one obtaining money by false pretences, one theft and two automobile theft.

Obviously, the age of the "defendant" or alleged juvenile delinquent was not considered decisive in all cases because in five cases it was not given. In three others, the age given was only approximate — in all three the child was over thirteen and somewhere between fourteen and sixteen years. The records in the report are inconclusive in all instances because the reader is never sure if the age given is the age at the time of the offence or the time of the appearance before the court.³⁶ In one case, for instance, the child was fifteen at the time he was before the court but only thirteen and one-half years when the offence allegedly occurred. This was probably an unusual case and we can assume that in most instances the age quoted in the reports is at most, six months more than the age when the crime was allegedly committed. One fourteen year old's case was waived. This was Steven Truscott. In six cases the child was fifteen. There were four seventeen year-olds and one eighteen year old.

In the light of recent developments in the United States, the scant attention given to procedure seems remarkable. In only ten cases was procedure considered an important issue; and in all but two cases the procedural shortcomings were not considered fatal to the waiver order. This observation is not meant to be a reflection on the operation of the juvenile court in Canada. The juvenile court philosophy (as expressed by *parens patriae* and section 38 of the *Juvenile Delinquents Act*) need not be compromised for the sake of blind adherence to formalistic attitudes by the juvenile court judge and the lawyers appearing before him. The requirements of due process can be applied to cases in which the juvenile does not admit the delinquency and he and his parents demand all legal safeguards or in cases in which the seriousness of the charge may require a full disclosure of the facts and a proper airing of the

³⁶ As to which age is decisive in a court hearing, see *Simpson*, [1964] 2 C.C.C. 316 at 324.

issues. The seriousness of the charge should not necessarily result in a trial; but if this is one of the considerations, then the due process formula could be employed. In fact, the whole debate on due process is very clearly raised by waiver cases and, of course, this was the focus of the *Kent* case which resulted in some constitutional legal safeguards being applied to juvenile cases. Some of the earlier cases implicitly (while it was explicit in *Kent*) referred to the philosophy of the juvenile court. Finally, and most importantly for the purposes of this essay, the waiver cases reflect, in a few isolated insights, the self-concept of the juvenile court judges and the attitudes of the superior legal courts to the specialized court for children.

Contrary to the view expressed in *Shoemaker*³⁷ the onus should *not* have jurisdiction. This seems to be the proper view to take if the law, admittedly discretionary, found in the *Juvenile Delinquents Act* (s. 2(h)) confers power on the juvenile court judge to hear all cases where a child under a specified age has allegedly committed an act criminal in an adult court under federal or provincial legislation.

The question of onus in waiver cases is not raised very often. Judge Wallace in *Simpson*³⁸ (one of the most enlightened judgments on waiver) takes the view that his judicial discretion is unfettered; although, he implies that he may have been faced with a more difficult decision if the Crown had been actively seeking transfer of the case. Judge Wallace goes to great pains to take every relevant factor into account before exercising his discretion; some of the other cases give the impression that a long citation-studded discussion of the ephemeral subject of discretion was more important than the concrete reasons for exercising that discretion.³⁹

Due process seems disproportionately important to the United States Supreme Court; the concept should certainly be honoured by the juvenile courts and the higher courts which review the exercise of their powers. In many respects, the problem of waiver is the true test of a juvenile court. Waiver goes to the very heart of the role to be played by a juvenile court. If a juvenile court unnecessarily transfers cases to the adult court, it is not protecting children; it may well be bowing to the retributive instincts of the public and may also be sacrificing a child to a brutalising adult penal system.

The survey of the waiver cases presents an encapsulated history of the juvenile court. This study is based only on reported cases and, no doubt, many other cases were waived in the first twenty years of the juvenile court's existence.

The juvenile court escaped criticism by higher courts for the first one or two decades of its life. The first waiver case in this survey was reported twenty-three years after the passage of the *Juvenile Delinquents Act*; *Rex v.*

³⁷ [1966] 3 C.C.C. 79.

³⁸ See n. 36, *supra*.

³⁹ *e.g.* *Shoemaker*, n. 37, *supra*; and *Re Regina v Arbuckle*, [1967] 3 C.C.C. 380.

*H.*⁴⁰ came before the Saskatchewan King's Bench in 1931. The appeal against transfer to the adult court was unsuccessful. The reasons for the transfer were the factors which became stereotyped in the ensuing years. The Saskatchewan King's Bench used the catch-phrases which have become all too common. The court talked of the interests of justice, questioned the possibility of a juvenile court giving a juvenile a fair trial. The court also decided that the juvenile (who was charged with arson) should be tried by a magistrate with legal training and by a jury if thought necessary. The court noted that the *Juvenile Delinquents Act* did not envisage exclusive jurisdiction for the juvenile court and felt the waiver order advisable when the juvenile's guilt was "strenuously denied". The decision is noteworthy because it only mentions these clichés and because it gives almost no thought to the juvenile as a child lacking discernment. Whether the Saskatchewan King's Bench would have felt differently if the juvenile had been one, two or three years younger or had been charged with wilful damage or trespass rather than arson, is hard to say.

A survey of the cases shows one interesting trend in the decisions relating to the waiver. With one exception, the clichés of waiver become less frequent with the passage of time. Some of these clichés have already been mentioned—these include the "interests of justice" and the "interests of the community". One cliché which has persisted (and which is mentioned, in one form or another, in nine of the cases surveyed although, curiously, not the most recent) is the "public's right to know". Sometimes this is described (as in four cases) as the dangers of a private *in camera* trial and the fact that the juvenile court is not designed for serious offences and that because of the great public sentiment against the accused, an open trial in adult court is necessary. Yet this view was not universal. The British Columbia Juvenile Court in *Regina v. P.M.W.*⁴¹ was rather ambivalent but it did decide that the murder trial of a juvenile should not be transferred because that would be "gambling with the life of a child". The court in that case also observed that the procedures of the court for children were very flexible and that the court was not meant for punishment. The court doubted, however, its ability to give a fair trial and reduced the charge to manslaughter and waived jurisdiction to adult court.

One comment of a general nature has considerable significance for the historian of the juvenile court. One of the earliest cases, *Re L.Y. No. 1*⁴² a decision of the Manitoba Court of Appeal decided in favour of waiver partly because the juvenile court was "experimental". It is only fair to point out that in this case, in which an eighteen year old was charged with murder, the Court of Appeal put forward some worthwhile reasons for waiver. These fac-

⁴⁰ [1931] 2 W.W.R. 917

⁴¹ 16 W.W.R. 650

⁴² 82 C.C.C. 105.

tors have become the most frequently used guide in later cases.⁴³ Obviously, the "experimental" label was simply a judicial excuse for waiver but the juvenile court has always (at least in the last forty years) suffered from this patronising attitude of the regular courts which are often antagonistic to the rehabilitative approach even in their own adult trials. Some stigma seems to be suggested by this label — as if the juvenile court was not a success or could not possibly be a success and was merely a sociological toy which could be used to deal with the mischievous, as opposed to 'criminal', children. The legally trained judges presiding over the superior court took a suspicious attitude towards the juvenile court because of that court's flirtation with the social and behavioural sciences. In the recent case of *Simpson*,⁴⁴ where the fifteen year old was charged with murder which he had allegedly committed when he was thirteen and one half years old, the court held that although the juvenile court was experimental, a proper trial could still be conducted by the juvenile court. The juvenile court judge's remarks have a slightly defensive (or is it ironic?) flavour:

I have considered the fact that the Juvenile and Family Court is, as has been termed by one judgment, an "experimental Court", and that it may be said to have no settled practice and that trials take place in camera. The Crown Attorney and defence counsel here are able and experienced. I am certain that with their assistance the practice to be followed in any such trial would be proper, and that the interest of the accused would be amply protected. The privacy of the trial would be in the interest of the child provided he can be assured of a fair trial. Privacy might be an element prompting a decision to proceed by way of indictment if public interest or sentiment were strongly against the child, or demanded an open trial by indictment. It is evident from the information given to me by counsel that this is not the case here, and that a cross-section of the community is here prepared to give evidence if this Court will proceed with the matter.⁴⁵

⁴³ (a) the age of the child.

(b) the Juvenile Court has no machinery nor settled procedure for trying so serious a charge as murder. The system in that Court is designed for lighter offences.

(c) The advantages of a private or secluded trial are offset by the danger of such a system and trial.

(d) The great safeguards of settled practice in Criminal Courts before a jury, under the scrutiny of the public, are established and must be followed in the ordinary Courts. This ensures to the accused a fair and open trial.

(e) The case is to be considered on the same footing as one in which public sentiment was strongly against the accused. On that footing, the ordinary Courts are safer than an experimental one such as a Juvenile Court.

(f) On the foregoing points (a), (b), (c), (d), (e), the experienced Juvenile and Family Court Judge might hold the honest opinion that the transfer is for the good of the child.

(g) The "interests of the community" demand nothing less and nothing more than that the juvenile be given a fair trial. To that end, the community has a right to know how that trial is to be conducted; they do know that such a trial is ensured in the ordinary Courts, but they cannot know it will be in the Juvenile Court where procedure is undefined or not settled, where the trial is in camera, and where the Judge generally interrogates the accused, where there is no benefit of jury or anything corresponding to that ancient safeguard:
from *Re L.Y. (No.1)*, 82 C.C.C. 105

⁴⁴ [1964] 2 C.C.C. 316

⁴⁵ *Id* at 324.

In *Sawchuk*,⁴⁶ the Manitoba Queen's Bench, in a case of a seventeen year old charged with discharging of a firearm causing bodily harm, upheld an appeal refusing to waive the case. The court held that it was no longer necessary to refer to the juvenile court as experimental. The remarks of the Manitoba superior court were also enlightened on other issues.

Of the twenty-three cases found in the reports, on thirteen occasions the decision to transfer to the adult courts was upheld. Only one of these cases involved a decisive procedural point while in the ten cases where the juvenile court retained jurisdiction, the reasons for the decision were basically procedural in three of the ten.

What were the major factors in enabling the courts to decide on transfer or retention by the juvenile court? As mentioned earlier, the "public's right to know" was mentioned as a major factor in nine of the cases and only in a third of these was the transfer refused. (Of these three cases, one was automobile theft,⁴⁷ one was manslaughter,⁴⁸ and one was murder.⁴⁹) In *Re Rex v. D.P.P.*, the Manitoba Queen's Bench held that an acquittal by a jury is more for the good of the accused than a trial *in camera* before a single judge of any any court. The court was "unable to accept counsel's opinion that the good of the accused is inferentially paramount as against the interests of the community".⁵¹ A related reason found in four of these cases was the dangers of a private trial. Little justification is given for these beliefs; is it distrust of the abilities of lay judges, of the injustices which will be perpetrated when the public is not watching or the need for the trial to be used as a morality play for and by the community at large? These reasons of a socio-cultural nature seem to be very ephemeral. They offer little solid basis for the decision to transfer. Most courts were unable to offer anything more concrete than a thinly disguised retribution (to put the harshest interpretation on their refusal to leave the juvenile in the court created for him) or a vague hunch that the morality play of the adult court trial must have its full presentation before a public audience. There is little or no discussion in these cases of the psychic harm to the child from the influence of an adult court — one of the primary reasons for establishing a court for children in the first place. A happy exception to this is the judgment in *Simpson*⁵² where, after taking into account the factors set out by Dysart J. in *Re L.Y.*⁵³, Judge Wallace also considered the mental state of the youth, the need to take the youth into custody if processed in adult court, the need for expediting of the trial, the interruption in schooling, and the strain which a public trial would impose

⁴⁶ 1 C.R.N.S. 139

⁴⁷ *R. v. Miller*, 132 C.C.C. 349

⁴⁸ *Regina v. M.*, [1964] 2 C.C.C. 135

⁴⁹ *R. v. Liefso*, 46 C.R. 103

⁵⁰ 92 C.C.C. 282, affirmed without written reasons by Manitoba Court of Appeal at 93 C.C.C. 159.

⁵¹ 92 C.C.C. 282 at 284.

⁵² [1964] 2 C.C.C. 316

⁵³ See n.43, *supra*

on Simpson and his foster parents. It must also be remembered that Simpson was being tried in a relatively small community (*viz* North Bay, Ontario) on a charge of murdering his father.

One or two cases make reference to the need for a full airing of the legal issues (including defences) which, presumably, could only be carried out in adult court, *e.g.* *Regina v. P.M.W.*⁵⁴ and *Regina v. Cline*,⁵⁵ and that the court was not designed for serious offences (which would presumably, attract sophisticated legal arguments) *e.g.* *Re L. Y.*⁵⁶ Penological or correctional factors only emerge on two occasions; in *Re L.Y.*,⁵⁷ the specious point is made that private, *in camera*, trials are only likely to "stimulate crime" among juveniles. On another occasion, *R. v. Pagee*,⁵⁸ the point was made that one of the basic considerations was the type of treatment needed for the youth. Little thought was given to the answer to this problem but, in *Pagee*, the court used it in a negative way to decide on transfer; *i.e.* the court decided whether the juvenile was likely to be deterred by disposition (or further referral) to training school as opposed to a prison term. The great fallacy in this is that the first offender in adult court is likely to receive probation unless the admirable procedure of keeping juvenile records secret is violated. The relative merits of juvenile and adult correctional institutions were also discussed in *Trodd*⁵⁹ where the youth allegedly committed a breaking and entering. The decision of the juvenile judge to transfer the case was upheld by the British Columbia Supreme Court. The evidence before the juvenile court was highly suspect, if not in content, at least in the form of its presentation. A police sergeant acting as Crown Counsel told the court of previous adjudications of delinquency (admittedly some of which had been made by the same judge) and of charges pending in other jurisdictions. A probation officer gave his opinion that the juvenile had "wholly exhausted the resources available to a Juvenile Court Judge and . . . that, in his opinion, the juvenile needed the control available in an adult institution."⁶⁰ A psychiatrist submitted a written report which also recommended an adult institution with "a very structured setting" where discipline would be an important factor and where "the constant wrong of escaping could be erased from his mind (after realizing that he could not escape) and hopefully allow him to learn a trade and change his sense of values and habits."⁶¹ The psychiatrist recommended that later the boy should be transferred to a treatment centre such as Warrendale in Ontario where he "could be allowed to continue his emotional and physical growth in a healthy atmosphere conducive to a proper development, constructive goals, and allowing him to mature along proper lines and develop a

⁵⁴ 16 W.W.R. 650

⁵⁵ [1964] 2 C.C.C. 38

⁵⁶ *Re L.Y. (No. 1)*, 82 C.C.C. 105

⁵⁷ Of course, there may be more merit in the notion that reports of juvenile court hearings, anonymous or otherwise, should be published in daily newspapers for their deterrent effect.

⁵⁸ 41 W.W.R. 159

⁵⁹ [1966] 3 C.C.C. 367

⁶⁰ *Id.*, at 370

⁶¹ *Id.*

sense of responsibility and a better sense of values".⁶² Whatever the merits or feasibility of these submissions, the youth's right to be treated fairly by the legal process does not seem to have been considered by either court. Even if the boy could be taught a trade and then transferred to an institution such as Warrendale, the court's preoccupation with treatment may seem admirable but, in fact, it is less humane as it not only invades the youth's rights but also makes him a victim of a system which has inadequate facilities for problem cases. On the other hand, the appeal court judge must be applauded for looking beyond the mere forms of trial in the two courts and discussing the welfare of the child after adjudication, whatever form it might take. The unfortunate fact is that the failure to help Trodd tends to corroborate the critics of the juvenile courts and reform schools. One wonders whether Justice Fortas is not correct when he says: That many children before the juvenile court get the worst instead of the best of the two worlds of adult punishment and flexible procedures.

If one thing is clear from the various cases decided under the *Juvenile Delinquents Act*, it is the unanimous opinion that that piece of legislation is poorly drawn:⁶³ This is certainly suggested by judicial criticisms of the "best interests of the child" in s. 38, "the interests of the community" in the waiver cases and "similar form of vice" in the glue sniffing cases.⁶⁴ Perhaps there is a simple reply to these criticisms; any attempt to carry out a positivistic analysis of a social welfare statute is going to lead to an impossible situation. Similarly, any attempt to redefine "juvenile delinquency" in terms wider than "junior" criminal offences and a redrafting of "best interests of the child" may well lead to difficulties.

One of the most perplexing cases is *Attorney-General of British Columbia v. Smith*.⁶⁵ The British Columbia Court of Appeal's several majority and dissenting judgments, particularly the latter, add something to the debate but the decision of the Supreme Court is, unfortunately, a typical judgment — one judge wrote a rather colourless decision adopting the majority view of the court below, adding little to our understanding of the juvenile court; the remainder of the court remained silent.

Magistrate G. O. Stewart of Prince George, British Columbia, one of the most enlightened and humane magistrates in the country, convicted Smith of a speeding charge and fined him under the province's *Highway Traffic Act*. Smith appealed the conviction on the grounds that he should have been treated as a juvenile which he certainly was under British Columbia law, although he was able under B.C. law to hold a driver's licence.⁶⁶ The British

⁶² *Id.*

⁶³ See, however, the commentary by the draftsman of the Act,

⁶⁴ See, Parker, *Glue Sniffing*, 11 CRIM. L.Q. 175

⁶⁵ [1966] 2 C.C.C. 311 (B.C.C.A.); [1969] 1 C.C.C. 244 (S.C.C.)

⁶⁶ The Minister of Justice's Report on Juvenile Delinquency recommends a uniform age for delinquency throughout Canada. See also the Report of the Ontario Legislature's Select Committee on Youth which discusses the age differences applying to such matters as driving, drinking, voting, etc.

Columbia Attorney-General, opposed by the Attorney-General of Canada, argued that the *Juvenile Delinquents Act* was *ultra vires* to the extent that it required prosecutions under provincial statutes to be within the exclusive jurisdiction of the juvenile court. In effect, Smith was arguing that it was a case of illegal waiver.

Perhaps it is fatal to ask a Canadian court to consider a major policy issue if it is likely to become embroiled in interpretations of Section 91 of the *British North America Act*. Such exercises do not lead to an intelligent, in-depth study of the issues but, instead, lengthy periods of navel contemplation. The majority of the B.C. Court of Appeal certainly treated the case in that way.

The Attorney-General of British Columbia argued that the Federal Parliament, in attempting to pre-empt the province's power to prosecute traffic offenders, was intruding upon a "forbidden field under the guise or cloak of enacting criminal law by what in reality, in its pith and substance, is only a procedural statute".⁶⁷ Lord J. A. rejected this view because the Federal Parliament (in 1907) had obviously taken the view that problems of child crime had "reached such proportions that it was in the public interest to treat those problems from a national point of view".⁶⁸ His Lordship took the view that the *Juvenile Delinquents Act* had created the "offence" of "delinquency" and provided a "totally different method of dealing with a juvenile offender"⁶⁹ and should override any provincial legislation.

Both Lord J. A. and Bull J. A. joined support for their views in the remarks of Locke J. in *Goodyear Tire and Rubber Co. of Canada Ltd. v. The Queen* where the Canadian Supreme Court judge said:

The power to legislate in relation to criminal law is not restricted in my opinion, to defining offences and providing penalties for their commission. The power of Parliament extends to legislation designed for the prevention of crime as well as to punishing crime.⁷⁰

The majority of the British Columbia Court of Appeal were preoccupied with occupying the field for the Federal Parliament. Bull J. A. describes the *Juvenile Delinquents Act* as a "complete and comprehensive criminal case for children". His Lordship does not speak of the peculiar nature of the "crime" of delinquency or the policy of the Act found in Section 38. This attitude facilitates his attempt to distinguish child welfare legislation from laws relating to juvenile delinquency which he sees as the "very essence of criminal law".⁷¹ He further explained this distinction:

Although the responsibility of the State for the care of people in distress, including the care and protection of children, whether neglected or not, lies within the provincial jurisdiction as was determined in *Reference re Adoption Act*, etc., [1938] 3 D.L.R. 497, [1938] S.C.R. 398, 71 C.C.C.110, the objects and purposes of the statutes therein considered are quite different from those of the *Juvenile Delinquents Act*. In the former the objects are directed to the control or

⁶⁷ [1966] 2 C.C.C. 338

⁶⁸ *Id.*, at 333.

⁶⁹ *Id.*, at 336

⁷⁰ 2 D.L.R. (2d.) 11 at 1q.

⁷¹ [1966] 2 C.C.C. 338 at 342.

alleviation of social conditions, the proper education and training of children, and the care and protection of people in distress including neglected children. In the latter, the object is clearly to govern the apprehension, punishment, proper care and guidance of children who are offenders against the laws of the community of whatever type and by whoever enacted to the end of the over-all prevention of crime.⁷²

Davey J. A. took a different view. He relied on the pith and substance test and decided that the *Juvenile Delinquents Act* was an act relating to the "protection and welfare of children",⁷³ because the Act was primarily interested in the way in which children were treated when they committed infractions of the law. He further held that the Federal Parliament obviously did not intend to provide a common standard for dealing with a national problem because the "condition of delinquency" could vary from one province or city to another. Furthermore, he argued, many provincial laws applying to behavior by children could hardly be said to be measures of crime prevention envisaged by Bull J. and Lord J. A. Norris J. A. agreed with his fellow dissenter that the wording of sections 2 (1) (h) and 3 (2) of the *Juvenile Delinquents Act* made it perfectly clear that the "offence" of delinquency is a "mere facade" because the latter section wants the child not be treated as an offender but as in the *condition* of delinquency. Norris J. A. was the only judge who mentioned, although fleetingly, section 38 of the Act.

Ironically, not a single judge of the British Columbia Court of Appeal makes reference to the juvenile court. Perhaps this is understandable in the dissenting judgments which are left in the inconsistent position of endorsing the philosophy of the juvenile court as expressed in sections 2, 3, and 38 of the *Juvenile Delinquents Act*, while seeking to give the provincial magistrates' court jurisdiction. On the other hand, what opinion would the majority have expressed if asked to comment on the constitutional pith and substance of the juvenile court. Before reaching a hasty decision, it is well to remember that head 27 of Section 91 of the *British North America Act* defines criminal law as including procedure.

In a unanimous decision, the Supreme Court of Canada⁷⁴ upheld the 3-2 decision of the court below. Fauteux J.'s judgment adds very little. His Lordship does set out the pertinent sections of the *Juvenile Delinquents Act*, including the Preamble which states:

Whereas it is inexpedient that youthful offenders should be classed or dealt with as ordinary criminals, the welfare of the community demanding that they should on the contrary be guarded against association with crime and criminals, and should be subjected to such wise care, treatment and control as will tend to check their evil tendencies and to strengthen their better instincts.

He also refers to the juvenile court itself, describing the privacy and informality of its hearings. Yet, the learned judge is still able to agree with Bull J. A.'s interpretation of *Reference re Adoption Act* that the legislation's pith and substance is very different from that of the *Juvenile Delinquents Act*.

⁷² *Id.*

⁷³ *Id.*, at 341.

⁷⁴ [1969] 1 C.C.C. 244.

The most remarkable statement in his judgment is his oblique reference to waiver although he does not specifically refer to transfer of a juvenile case to adult court. He said:

A very wide discretion is given to the judge, under the Act, and it is significant that, in the exercise of such discretion, the interest of the child is not the sole question to consider. On the contrary, the matters which, in principle, must receive the attention of the judge and which he must try to conciliate are the child's interest or own good, the community's best interest and the proper administration of justice. This, I think, qualifies the nature of the protection which the Act is meant to give to juveniles alleged or found to be delinquents and supports the proposition that the Act is not legislation in relation to protection and welfare of children within the meaning envisaged in the *Adoption Act* case, *supra*.⁷⁵

One would have thought that the reverse was more likely to be true. Waiver cases are quite atypical (and form a negligible percentage of all delinquency charges) and accentuate the non-criminal quality of the cases which remain in the juvenile court. Of course, we must not misinterpret Fauteux J. He is certainly not advocating the transfer of cases to adult courts. On the contrary, the very essence of his judgment is the retention by the juvenile court of trial of traffic violations by juveniles. In the present context, this is hardly the point. The disquieting aspect of the *Smith* case is that, once again, the appeal courts seem to have shown a sad lack of understanding for the true quality of the juvenile court. The remarks of Fauteux J. to the effect that the *Juvenile Delinquents Act* is a "criminal" statute may have simply been a constitutional skirmish but, on the other hand, this characterization of the Act may well return to haunt the juvenile court. If this is to be taken as an indication of the future for the juvenile court, then the efforts of those who believe that the court should spend less time adjudicating delinquency and more time on community prevention programs, family counselling, better liaison with the schools and the overall application of the original aims of the court will be sorely disappointed. If the appeal courts fail to understand the social welfare philosophy of the juvenile court, in the *Smith* case, then the children's court may well suffer other incursions on its powers.

Finally, this article was postponed so that the latest volumes of the report of the Family Law Project (sponsored by the Ontario Law Reform Commission) could be examined and commented upon. Frankly, the wait was hardly worthwhile. Although Volume X (the most pertinent volume in the present context) describes such topics as family counselling and day care for children, the discussion of the juvenile court itself is almost purely descriptive and limited to administrative detail. The recommendations for "reform" are limited to the two alternative schemes for upgrading the status of the judges. Both schemes seem to be quite impractical.

Admittedly, the writers of the report make the worthwhile, but far from original, suggestion that all family matters (including divorce) should be in the hands of the Provincial Court (Family Division). On the question of the future juvenile court as a tribunal for dealing with children and "solving" their behavioural and social problems as soon as possible, the report makes no concrete recommendations.

⁷⁵ *Id.*, at 246.

The Family Law Project and the decisions of the appeal courts described above are clear indications of the misconceptions surrounding the court. The Family Law Project, as much as the appellate courts, seem to be convinced that the judicial treatment of the juvenile has some intrinsic merit. While the Project sees various activities as ancillary and no doubt vital to the juvenile court's function (which were totally ignored by the appeal courts) the Supreme Court of Canada and other superior courts of the provinces seemed unable to look beyond the legalistic questions. The philosophy underlying the *Juvenile Delinquents Act* was seldom mentioned. Indeed, the juvenile court, as a unique institution, was usually ignored; instead, the welfare of the child as could be expressed through the services of the specialized court was seldom considered. The repressive qualities of the criminal process seem to have taken pre-eminence over the rehabilitative ideal of the juvenile court. Why should this be? Why have the ordinary courts refused to define and understand the philosophy of the juvenile court? Perhaps the real reason is that the adult courts believed the assertion that the children's court is "experimental" and too *avant garde* for a criminal law process which is based on retribution. The simple fact is that the appeal courts do not believe in the system of juvenile justice — unless it is an innocuous case of a mischievous child performing some trivial act.⁷⁶

⁷⁶Two very recent cases give some new insights but have been published too recently to be included in the above analysis; *Regina v. Beeman*, (1969) 69 W.W.R. 624 and *Regina v. Proctor*, (1969) 69 W.W.R. 754.

